PHILEO ALLIED BANK (M) BHD

v.

SHAHRUL BAHTHIAR TUMPANG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: D4-22-2393-1998]
28 MAY 2008

BANKING: *Cheques - Payment of cheque - Plaintiff failed to receive money purportedly payable under cheque - Whether defendants, persons to whom money was paid to, must repay or return it to plaintiff - Whether plaintiff entitled to repayment or return of it - Contracts Act 1950, s. 73*

The plaintiff claimed against the defendants, *inter alia*, for the sum of RM426,038.49 being the overdrawn debit balance in SNF Technology's current account with the plaintiff's branch ('the plaintiff's branch') where at the material time, the defendants were the partners of SNF Technology. The plaintiff's claim against the defendants arose from a cheque from 'Wachovia Bank of Georgia' ('the said foreign cheque') for the sum of USD125,027 deposited by the defendants through the first defendant into SNF Technology's current account ('the said current account'). The plaintiff's branch computer system had automatically credited into the said current account with the sum of RM434,656.37 being the equivalent to the sum of USD 125,027. About a month later, on 29 April 1998, a total sum of RM426,000 was withdrawn from the said current account by the defendants and/or under the instructions and authority of the defendants through two cash cheques. The head office of the plaintiff was informed on or about 30 April 1998 by Citibank of New York which was the clearing bank, that the said foreign cheque was returned without payment because it was a fraudulent cheque. On or about 2 May 1998, the plaintiff debited the sum of RM435,093.96 (equivalent to the sum of USD125,027) into the said current account and deducted the said amount from the balance left in the said current account ie RM9,055.47. As a result, there was an overdrawn debit balance of RM426,038.49 in the said current account. Since the clearing bank, the Citibank of New York, had found the cheque returned on the grounds it was a fraudulent cheque; the conclusion was that the plaintiff had never received the money purportedly payable under the cheque.

Held (judgment entered for plaintiff):

(1) Pursuant to s. 73 of the Contracts Act 1950, the defendants being persons who in the circumstances were persons to whom money has been paid or anything delivered by mistake, must repay or return it. Nothing in the said s. 73 provides an exception to an innocent party. Thus, even if the defendants were innocent and were themselves the victims of a fraudulent scheme, the nature of the payment or delivery to them by the plaintiff remained the same, and pursuant to s. 73 the plaintiff was entitled to repayment or return of it. (para 11)

(2) The plaintiff had not erred in debiting the defendants' account with the equivalent of USD125,027. There was also a clear misappreciation on the part of the defendants that a credit in their account was their money. A credit in a bank customer's account is a statement that the bank owes him that sum. A deficit is likewise a statement that the bank customer owes that sum to the bank. The subtraction of the credit sum of RM9,055.47 in the defendants' current account was, therefore, clearly proper in order to calculate the balance due to the plaintiff. (para 13)

Case(s) referred to:
Teknik Cekap Sendirian Berhad v. Public Bank Berhad [1995] 4 CLJ 697 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 73

For the plaintiff - WY Chen & Cains Tan; M/s Tan Hock Chuan & Co
For the defendants - RV Lingam; M/s RV Lingam & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail J:

[1] The plaintiff, Phileo Allied Bank (Malaysia) Bhd claimed against the defendants *inter alia* for the sum of RM426,038.49 as at 29 April 1998 being the overdrawn debit balance in SNF Technology's Current Account with the plaintiff's branch at Menara IMC, Jalan Sultan Ismail, Kuala Lumpur (hereinafter referred to as "the plaintiff's branch") where at that material time, the defendants were the partners of SNF Technology.

The Background

[2] An adjudicating order and receiving order dated 21 September 2000 had been obtained against the 3rd defendant *vide* Kuala Lumpur High Court Bankruptcy Notice No: D3-29-693-1999. The current action by the plaintiff is thus against the 1st and 2nd defendants ("defendants").

[3] The plaintiff's claim against the defendants arose from a cheque from "Wachovia Bank of Georgia" No. 00507752 dated 13 March 1998 (hereinafter referred to as "the said foreign cheque") for the sum of USD125,027 deposited by the defendants through the first defendant into SNF Technology's Current Account (hereinafter referred to as "the said current account") on 25 March 1998. The plaintiff's branch computer system had automatically credited into the said current account with the sum of RM434,656.37 being the equivalent to the sum of USD125,027 (at the currency exchange rate of 3.48 less clearing charges of RM437.59).

[4] About a month later, on 29 April 1998, a total sum of RM426,000 was withdrawn from the said current account by the defendant sand/or under the instructions and authority of the defendants through two cash cheques.

[5] The head office of the plaintiff was informed on or about 30 April 1998 by Citibank of New York which was the clearing bank, that the said foreign cheque was returned without payment because it was a fraudulent cheque.

[6] On 30 April 1998, an officer of the plaintiff by the name of Encik Muslim bin Yahaya ("PW1") lodged a police report at the Police District Headquarters at Dang Wangi under Dang Wangi Report No. 9305/98.

[7] On or about 2 May 1998, the plaintiff debited the sum of RM435,093.96 (ie, equivalent to the sum of USD125,027 at the currency exchange rate of 3.48) into the said current account and deducted the said amount from the balance left in the said current account ie, RM9,055.47. The result is there was an overdrawn debit balance of RM426,038.49 (ie, RM435,093.96 - RM9,055.47) in the said current account. This was informed to SNF Technology *vide* the plaintiff's letter dated 9 May 1998.

[8] The plaintiff merged with Malayan Banking Berhad in 2001. However, all the rights, liabilities and/or obligations of the plaintiff remain the same. The matter of the plaintiff's merger was never raised and/or objected by the defence counsel at the trial, and it is therefore unnecessary to deal with it.

[9] Since the clearing bank, the Citibank of New York had found the cheque returned on the grounds it was a fraudulent cheque, the conclusion is that the plaintiff never received the money purportedly payable under the cheque. The delivery by the plaintiff of RM426,000 under two cash cheques at the end of April 1998 was clearly a mistake since it is evident it was subsequently found that the plaintiff had erroneously credited the defendants' account with the equivalent of the USD125,027, being the face value of the cheque deposited by the defendants. Pursuant to s. 73 of the Contracts Act 1950 (Act 136) the defendants being persons who in the circumstances were persons to whom money has been paid or anything delivered by mistake, must repay or return it. *Teknik Cekap Sendirian Berhad v. Public Bank Berhad* [1995] 4 CLJ 697 CA is a case where a demand made under a performance bond was found to be defective and the appellant was required to return the money received from the respondent bank under the performance bond.

[10] Section 73 of the Contracts Act (Act 136) provides as follows:

> **73. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.**
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> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.
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> ILLUSTRATIONS
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> (a) A and B jointly owe $100 to C. A alone pays the amount to C, and B, not knowing this fact, pays $100 over again to C. C is bound to repay the amount to B.
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> (b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

[11] It is observed that nothing in s. 73 provides an exception to an innocent party. Thus, even if the defendants were innocent and were themselves the victims of a fraudulent scheme, the nature of the payment or delivery to them by the plaintiff remained the same, and pursuant to s. 73 the plaintiff is entitled to repayment or return of it. In the event, it is unnecessary for the court to make findings as to whether the defendants were fraudulent or dishonest in depositing the cheques or in the withdrawal of the sum under the two cheques.

[12] The defendants had counter-claimed as follows:

> 19. Defendan Pertama dan Kedua dalam tuntutan balasnya ingin mengulangi perenggan 1 hingga 18 Penyata Pembelaan ini. Berdasar kepada fakta-fakta yang dinyatakan dalam Penyata Pembelaan Defendan Pertama dan Kedua, Defendan Pertama dan Kedua menyatakan bahawa pihak Plaintif dalam tindakan ini telah secara tidak sah disisi Undang-Undang serta salah perbuatannya sebagai pihak Bank Defendan Pertama dan Kedua telah salah mendebitkan wang jumlah sebanyak RM426,038.49 dari Akaun Semasa Defendan.
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> 20. Tambahan, Plaintif juga salah disisi undang-undang menolak jumlah RM9,055.47 yang wujud ada di dalam Akaun Semasa Defendan.

[13] In the light of the conclusion earlier above, the plaintiff has not erred in debiting the defendants' account with the equivalent of USD125,027. There is also a clear misappreciation on the part of the defendants that a credit in their account is their money. A credit in a bank customer's account is a statement that the bank owes him that sum. A deficit is likewise a statement that the bank customer owes that sum to the bank. The subtraction of the credit sum of RM9,055.47 in the defendants' current account was, therefore, clearly proper in order to calculate the balance due to the plaintiff.

[14] In the event, judgment was entered for the plaintiff as prayed and the defendants' counter-claim dismissed, both with costs.